

**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**  
**January 11, 2002**

**In Reply Refer To:**  
1800B3-IB

VIA FACSIMILE

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In re: KIEV(AM), Culver City, CA  
Facility ID No. 57893  
File No. BP-20111, as modified  
by BMAP-20001020AAT

Dear Mr. Kersting:

This letter concerns the staff's December 20, 2001 and January 8, 2002 letters, which denied the uncontested December 7, 2001 request filed of Royce International Broadcasting Company ("Royce"), for additional time to construct KIEV(AM), Culver City, California, and set an expiration date of January 31, 2002. We have since learned of an error in these decisions. Accordingly, pursuant to 47 C.F.R. §1.113(a), those actions are rescinded, Royce's request is returned to pending status, and considered herein. As detailed below, Royce's request is denied and Royce is given 84 days to complete construction.

Background. The referenced permit has a 17-year history, including two authorizations to relocate the tower site and ten extensions of the permittee's period to construct approved under our former construction period rules. In transitioning to the new stricter construction rules, the Commission *sua sponte* extended outstanding permits, including Royce's, for one year, *i.e.*, to December 21, 2000. *Memorandum Opinion and Order* in MM Docket 98-43 ("*Streamlining MO&O*"), 14 FCC Rcd 17525, 17536 (1999). The Commission further extended to December 21, 2001 a number of AM construction permits, including Royce's, for which the permittees had filed major change applications in the AM Auction 32 filing window. "AM Auction No. 32 Non-Mutually Exclusive Applications," 15 FCC Rcd 18,004 (2000). The purpose of that additional 12-month extension was to ensure that such stations would have an opportunity to construct under the new stricter construction rules. On September 28, 2001, the Commission granted Royce's major modification application to specify a new community of license and to construct at a new site.

Royce recognizes that it is not entitled to treatment pursuant to the Commission's tolling provisions, 47 C.F.R. §73.3598(b), because it has already received an unencumbered three-year construction period. *See also Report and Order* in MM Docket 98-43, 13 FCC Rcd 23056, 23092 (1998). Royce therefore requests a waiver of 47 C.F.R. §73.3598(a), the Commission rule that requires completion of construction and the filing of a covering license application within three years from the date of issuance of the original construction permit. It is well established that the Commission can waive any of its rules. *See, generally, WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972). Applicants seeking such waiver must "articulate a specific pleading and adduce concrete support, preferably documentary" (emphasis added). *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 n.3 (1968). With specific respect to waiver of our construction period rule, the Commission has stated that it will waive this rule when there is clear evidence of "rare and exceptional circumstances" beyond the permittee's control. *See Streamlining MO&O*, 14 FCC Rcd at 17541.

In support of its waiver request, Royce states that, following a series of zoning problems, it filed an application in October 2000 during the AM major change filing window. The application sought to change KIEV's community of license from Burbank to Culver City, and thereby correct community coverage problems that prevented our approval of a new site proposed in a 1998 application. It would share the site with station KDIS(AM), Los Angeles, California. Royce states that KDIS "changed its mind" at some unspecified site and withdrew its assurance of site availability for KIEV. On August 6, 2001, Royce amended its application to specify another new tower location, this time seeking to construct on property in Montebello, California owned by Stocker Resources, Inc. ("Stocker"). The staff granted Royce's application on September 28, 2001, requiring completion of construction by the existing December 21, 2001 expiration date.

Royce indicates that it cannot begin to construct because Stocker now requires Royce to obtain approval from the local land use authority. Royce has not yet filed for this approval, and predicts that the zoning process may take five months or more. In addition, Royce claims other factors warrant waiver in this instance. First, Royce states that it has spent more than \$300,000 purchasing technical equipment and seven acres of land for the station's tower array in Montebello. Second, Royce claims that its situation is beyond its control and is similarly-situated to those of several DTV permittees that either received extension of their construction period or did not forfeit their permit because of various zoning and tower siting issues. *See Requests For Further Extension of the November 1, 2000 Digital Television Construction Deadline ("DTV Deadline")*, 16 FCC Rcd 8122 (2001). Third, Royce claims that the Commission's recent action waiving Section 73.3598(a) to provide an additional three years to construct for the permittee in *Texas Grace Communications* ("Texas Grace") (DA 01-317), \_\_ FCC Rcd \_\_\_\_ (October 26, 2001) confirms that that extensions are warranted for community of license changes. Further, Royce states it is willing to operate at a reduced power pursuant to Special Temporary Authority pending zoning approval. Finally, Royce notes that its permit involves grandfathered prohibited groundwave contour overlap that would be lost in the event its permit is forfeited.

Discussion of Royce's Request. We have considered the arguments presented in Royce's 35-page request and examined the 100-plus pages of supplementary material contained in the request's six appendices. Our analysis leads us to the conclusion that Royce has not demonstrated rare and exceptional circumstances beyond its control to justify a waiver. We note in particular the Commission has previously emphasized that diligent permittees eliminate or mitigate zoning delays by applying for approval from the local authorities prior to the issuance of a construction permit. *Streamlining MO&O*, 14 FCC Rcd at 17540.

Royce first considered the Montebello site in April 2000, and received assurances of the site's availability at some unspecified date thereafter.<sup>1</sup> Royce implies that it could not commence the local zoning process at that point. This is not correct. While Royce documents that Stocker offered to assist Royce in this process after the FCC approved the major modification application, this did not prevent Royce from initiating this process independently prior to the permit's grant. The responsibility for the associated zoning delay must therefore be attributed to Royce, which knew six months prior to filing its major modification application and sixteen months prior to amending this application that it would use the Montebello, not the KDIS, site for its transmitting facilities. Given its own inexplicable lack of urgency at this stage, we find no reason to reward Royce now for its private business decision not to seek zoning approval until its modification was approved in September, 2001.

We also reject Royce's claim that its situation is similarly situated to recent DTV and commercial FM cases. With respect to the DTV situations, the Commission extended by six months the deadline for six stations to begin simulcasting DTV signals in acknowledgement of demonstrated zoning and tower siting issues. *DTV Deadline*, 16 FCC Rcd at 8124-25. Unlike the instant matter regarding a waiver of the construction deadline in Section 73.3598, the DTV actions waived a DTV-specific schedule in Section 73.624(d)(1). The two rules are not similar in their purpose.

Further, the zoning matters in these cases are readily distinguishable from Royce's situation. All six DTV parties documented clear zoning and/or tower siting problems. The Commission was therefore able to confirm that the affected stations were "diligent in seeking to construct their DTV facilities and only because of unforeseeable or uncontrollable delays were they unable to complete construction of the facilities proposed in their original construction permits." *DTV Deadline*, 16 FCC Rcd at 8126. In the instant matter, Royce exhibited none of this diligence. Most significantly, Royce never applied for zoning, and therefore there is no documented zoning or other tower siting problem. The need for zoning approval was foreseeable; Royce's private business decision not to proceed diligently in this regard once it concluded that the Montebello site was its preferred site is inexplicable.

Royce also relies on a second DTV matter. The Commission clarified in its *Streamlining* action that the circumstances described by one petitioner to the proceeding,

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<sup>1</sup> *Declaration of Cliff Clement*, Appendix E to Request.

Kansas City, Missouri DTV permittee KCWE(TV), would be considered unique. The Commission indicated that these circumstances were applicable to “only a small number of full-service television permittees.” *Streamlining MO&O*, 14 FCC Rcd at 17541. Specifically, KCWE’s permit was not considered forfeit because the licensee was prevented for reasons demonstrably beyond its control from timely filing its covering license application. KCWE experienced delays beyond its control while the Commission finalized its DTV allotment table, which delayed action on a rulemaking proceeding concerning KCWE’s needed channel change. KCWE commenced program test authority while the rulemaking was in progress via a technical special temporary authority, and the station could not therefore be considered “unbuilt station,” as that term is defined in 47 C.F.R. §73.3597(c)(1)(i). *Streamlining MO&O*, 14 FCC Rcd at 17541.

KIEV’s circumstances are also clearly distinguishable from those of the FM permittee in *Texas Grace*. In *Texas Grace*, the Commission waived its construction period rule, 47 C.F.R. §73.3598(a), based on its finding that the Commission had not been completely clear to permittees with “then-outstanding modification requests stemming from rulemaking proceedings.” *Texas Grace*, at paragraph 10. *Texas Grace* did not create a blanket waiver for all change of community applications. The Commission limited such treatment to permittees that as of the *Streamlining MO&O*’s October 6, 1999 release date had pending modification requests that stemmed from rulemaking proceedings. *Id.* Royce filed its modification application in October 2000, more than twelve months after the Commission’s *Streamlining MO&O*. Further, as an AM permittee, Royce was not subject to a rulemaking proceeding for its community of license change. Accordingly, Royce may not rely on the unique circumstances detailed in *Texas Grace*.

Discussion of International Matters. In the December 20, 2001 decision, rescinded herein, we stated that even had Royce proceeded expeditiously to secure zoning approval prior to the grant of its modification application, the referenced permit was so conditioned as to effectively preclude commencement of construction at the authorized site. We found that, as a result of a condition concerning international coordination, Royce effectively had no opportunity to use of the limited additional construction opportunity that the Commission provided to Auction 32 AM permittees to complete construction. *Streamlining MO&O*, 14 FCC Rcd at 17540.

Our December 20, 2001 action incorrectly identified the international condition as pertaining to completion of the International Telecommunications Union (“ITU”) registration process, which we believed was pending. We waived the rules to provide Royce 84 days following ITU clearance to construct (equal to the 84 days between the conditional grant of KIEV’s major modification application and the permit’s December 21, 2001 expiration). In fact, the permit was not awaiting ITU approval. Rather, the permit needed only Mexican approval pursuant to the bilateral agreement between Mexico and the United States. The International Bureau informs us that Mexico cleared this matter on November 8, 2001, and that there are no remaining international impediments to construction. On January 8, 2002, we removed the condition from the

permit. The revised permit bears an expiration date of January 31, 2002 (84 days from the November 8, 2001 Mexican clearance).

Essentially, we made an error in Royce's favor. Had we known at the time of our December 20, 2001 letter that the only international impediment to construction was a Mexican clearance received almost two months earlier, we would have found that Royce had an opportunity to construct under the time given to AM Auction 32 permittees and would not have given it any additional time. Nevertheless, due to our error, it is possible that the permittee may have had an expectation that it would receive at least 84 days in the future to construct after resolution of an ITU matter, whereas the resulting January 31, 2002 expiration date, following the discovery of the Mexican clearance, gave Royce considerably less time. In the interest of fairness, we will therefore waive 47 C.F.R. §73.3598(a) to provide Royce with 84 days from its current expiration date (until April 25, 2002) to complete construction. Failure to complete construction and to file a timely application for a license to cover will result in forfeiture of the KIEV(AM) permit.

Accordingly, pursuant to 47 C.F.R. §1.113(a), the staff's actions dated December 20, 2001 and January 8, 2002 ARE RESCINDED and Royce's request is returned to pending status. For the reasons set forth above, Royce's request for a three-year extension to construct pursuant to the referenced permit IS DENIED, and, on our own motion, 47 C.F.R. §73.3598(a), IS WAIVED to provide that the construction permit for station KIEV(AM) will expire April 25, 2002.

Sincerely,

Peter H. Doyle  
Chief, Audio Services Division  
Mass Media Bureau